SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044-0407
Office: +1.202.626.6600
Fax: +1.202.626.6780

Direct Dial: +1.202.626.6838
Jnadler@ssd.com

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

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ELECTRONICALLY FILED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Proposed Deregulation of ILEC-Provided Broadband Telecommunications Services and Elimination of ILEC Information Services Unbundling Requirement, CC Dockets 02-33 and 01-337

Dear Ms. Dortch:

In recent meetings at the Commission, the Information Technology Association of America ("ITAA")[1] expressed its strong opposition to the proposed elimination of the requirement, under the Commission's *Computer II* rules, that incumbent local exchange carriers ("ILECs") unbundle the telecommunications functionality that they use to provide broadband information services and make that functionality available, as a telecommunications service, on just, reasonable, and non-discriminatory prices, terms, and conditions. The elimination of this requirement, ITAA demonstrated, would drive many broadband Information Service Providers ("ISPs") out of the market, thereby harming consumers.

During the course of those meetings, ITAA was asked to respond to the suggestion, made by some parties, that ISP competition is unimportant, and should be sacrificed to promote broadband deployment and "regulatory symmetry" between ILECs and cable system operators. ITAA's response is contained in this letter. As demonstrated below:

[1] ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States, ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of Information Service Providers.

- Because ISPs remain dependent on the ILECs for the provision of wholesale mass-market broadband telecommunications services that ISPs require to provide information services to their subscribers, elimination of the *Computer II* unbundling rules effectively would replace today's competitive information services market with a broadband duopoly, in which many users would be forced to choose between an ILEC-selected and a cable-selected ISP.

- Reducing or eliminating broadband ISP competition would have an adverse impact on consumers. ISPs are more than fungible "conduits" to information on the World Wide Web. ISPs compete based on a wide range of factors, including: price, service quality and reliability, ability to support bandwidth-intensive applications, availability of proprietary content and applications, availability of customer premises equipment, and adequacy of security/privacy protection. If the Commission eliminates the *Computer II* unbundling rule, the resulting broadband Internet access service duopoly likely would be characterized by higher prices, fewer choices, lower service quality, and reduced innovation.

- The Commission's desire to promote broadband deployment does not justify elimination of the *Computer II* unbundling rules. There is no "demand-side" broadband shortage. Nor does the Commission have any basis to conclude that the *Computer II* unbundling requirement has created a disincentive to broadband deployment. The rule does nothing more than require the ILECs to give non-affiliated ISPs the option of purchasing broadband telecommunications services on the same terms on which the ILECs have chosen to provide these services to themselves.

- Promoting "regulatory symmetry" between ILEC and cable broadband services does not justify radical deregulation. The fact that cable system operators are not legally obligated to provide unbundled broadband transmission service on request – and because, in practice, they do not do so – does not provide a basis to eliminate the ILECs' common carrier obligations. To the contrary, it makes it *more* important to ensure that the ILECs continue to fulfill their statutory obligations as common carriers by providing the broadband telecommunications services that ISPs require.

In light of the above, the Commission should not consider eliminating the *Computer II* unbundling requirement until the market for wholesale mass-market broadband telecommunications services is subject to effective competition. To the contrary, the Commission should vigorously enforce the ILECs' obligation to unbundle the telecommunications functionality that they use to provide information services, including Internet access service.

Elimination of the *Computer II* Unbundling Rules Would Result in the Creation of a Broadband ISP Duopoly

Elimination of the *Computer II* unbundling requirement would significantly reduce – if not eliminate – meaningful competition among broadband ISPs. At the present time, ISPs remain dependent on the ILECs for the provision of wholesale mass-market broadband telecommunications services that ISPs require to provide broadband information services to their subscribers. If the Commission lifts the unbundling obligation, and reclassifies broadband telecommunications services as private carriage, ILECs could *refuse* to provide wholesale mass-market broadband telecommunications services to non-affiliated ISPs – or could provide these services at higher prices, or on far less favorable terms, than those enjoyed by the ILECs' information service operations. This inevitably would drive many non-affiliated broadband ISPs from the market.

The ILECs' ability to drive non-affiliated broadband ISPs from the market is not constrained by either Competitive Local Exchange Carrier ("CLEC") "intra-modal" or cable "inter-modal" competition. CLECs currently provide less than three percent of all DSL lines.[2] Moreover, the ability of CLECs to provide even this limited competitive "check" will be severely reduced, if not completely eliminated, if the Commission chooses to end the ILECs' obligation to provide DSL "line sharing."[3] At the same time, cable systems do not provide a viable alternate source of supply of wholesale broadband transmission service for most ISPs. While some cable systems are "partnering" with a handful of selected ISPs, *no* cable system has offered to make broadband capacity generally available to any requesting ISP. In any case, many cable systems have not yet been "upgraded" to provide broadband, and those that have been typically do not serve business customers. Some users, moreover, are reluctant to use cable-based Internet access services, believing that – because they rely on a "shared infrastructure" rather than a dedicated transmission path – they may not always provide the same level of reliability and privacy as wireline-based services.[4]

Given the lack of alternative sources of supply, elimination of the *Computer II* unbundling requirement would likely result in the creation of a broadband ISP duopoly, in which most customers

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[2] *See High-Speed Service for Internet Access*, Report, at Table 5 (Indus. Anal. & Tech. Div., July 2002) *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0702.pdf ("*High-Speed Service for Internet Access*"). The percentage of CLEC-provided DSL lines has declined from a high of seven percent.

[3] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22805 (2001).

[4] *See generally* Comments of Ad Hoc Telecommunications Users Committee, CC Docket No. 01-337, at 17-19 (filed Mar. 1, 2002) (cable modem service is not "a source of intermodal competition to incumbent LEC broadband business service offerings.").

would be forced to choose between an ILEC-affiliated and a cable-affiliated ISP.[5] The end-result would be to deprive consumers of the significant benefits that they enjoy in today's competitive broadband information services market.

Information Services Competition Benefits Users

Some parties advocating elimination of the *Computer II* unbundling rules have suggested that the Commission should not be concerned about preserving ISP competition because ISPs are little more than fungible "passive conduits" to information on the World Wide Web. This is clearly incorrect. The mass-market broadband Internet access market consists of two categories of users. Most attention has focused on residential and small business customers who use the Internet to access content on the World Wide Web and to send and receive e-mail. However, an increasingly large number of residential customers are using high-speed Internet access in order to telecommute.[6] Indeed, a recent study by the Department of Commerce Technology Administration found that "the most significant driver for consumer broadband adoption has been telework – the ability for consumers to work from home more

[5] Paradoxically, the Commission's proposal to eliminate the *Computer II* unbundling rule, and reclassify broadband telecommunications offerings as a Title I service, could actually result in *increased* government regulation. The *Computer II* regime creates a clear line of demarcation between telecommunications services and information services (including Internet access services). Under that regime, the ILECs' broadband telecommunications services are subject to regulation, while competitive market forces have proven sufficient to regulate ISPs' conduct. The Commission has suggested that, if the ILECs are no longer required to unbundle the telecommunications services that ISPs use to provide information services, it may be necessary to impose certain common carrier-type regulatory obligations on the surviving providers of broadband Internet access services. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 17 FCC Rcd 3019, 3043-47 (2002) (inquiring about the applicability of network reliability and consumer protection obligations – previously imposed only on "telecommunications service providers"). Imposition of common carrier-type regulations on ISPs would be an unprecedented erosion of the line of demarcation created in *Computer II,* an unlawful expansion of the Commission's narrowly circumscribed authority under Title I, and a clear violation of the congressional policy expressed in the Telecommunications Act. *See* 47 U.S.C. § 230(b)(2) (establishing a national policy of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

[6] The term "telecommuting" refers to arrangements under which employees are able to work from home by using mass-market broadband Internet access services.

readily."[7] The existence of a competitive broadband information services market is of critical importance to both categories of mass-market customers.

Residential and small business. A recent study, conducted by J.D. Power and Associates, provides strong evidence of the importance to residential consumers of being able to choose among broadband ISPs. The study ranked customer satisfaction with the ten leading broadband ISPs – such as AOL, AT&T Broadband, MSN, RoadRunner, and Verizon. The ranking was based on seven factors that customers indicated were important in choosing among ISPs: billing; cost of service; e-mail; customer service; image; offerings and promotions; and performance and reliability.[8] The study revealed that consumers identify significant difference in the quality of service provided by different broadband ISPs, and frequently switch among providers. "While price is the number one issue when switching ISPs," according to the firm's Senior Director of Telecommunications, "reliability and customer service continue to outweigh price in determining overall satisfaction and customer retention."[9] In order to succeed in a market in which "competition to provide high levels of customer satisfaction . . . is intensifying," he added, broadband ISPs must offer more than "a fast connection."[10]

Telecommuters. ISP competition is equally, if not more, important to firms – including some of ITAA's member companies – that are seeking to establish large-scale telecommuting programs. Such firms typically provide employees with access to mass-market broadband Internet access services (usually based on DSL technology) in order to enable their employees to have cost-effective, robust, reliable, and secure access the firm's internal network. In selecting an ISP, these firms consider a wide-range of factors that differentiate one provider from another. Several of the most important factors are discussed below:

- *Price.* Broadband ISPs clearly compete based on price. Especially with larger telecommuting programs, this can be a significant factor. For example, some broadband ISPs have sought to impose a "VPN surcharge" on any broadband residential Internet access service that is used to access a corporate private network. Other ISPs have chosen not to do so.

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[7] Office of Technology Policy, Technology Administration, Department of Commerce, *Understanding Broadband Demand*, at 15 (Sept. 23, 2002), *available at* http://www.ta.doc.gov/reports/TechPolicy/Broadband_020921.pdf ("*OTP Report*").

[8] *See* J.D. Power and Associates, Press Release (Aug. 20, 2002), *available at* http://www.jdpa.com/presspass/pr/pressrelease.asp/ID=2002064.

[9] *Id.* (quoting Steve Kirby, Senior Director of Telecommunications).

[10] *Id.*

- *Service Level/Performance.* Broadband ISPs also compete based on the quality of the service that they provide. This is extremely important to firms establishing telecommuting programs; in order to be effective, the at-home employee must have access to content and applications comparable to his or her office-based colleagues. In response to this need, ISPs often enter into service level agreements that commit them to provide service that meets specified metrics regarding factors such as latency (speed with which information moves from point of origin to destination), packet loss rates, mean time between service failures, and mean time to restore service.

- *Application Support.* The ability to support bandwidth-intensive user applications is another factor that broadband ISPs use to compete against each other. Telecommuters often need fast and reliable access to bandwidth-intensive applications and content – such as complex spreadsheets, graphics, audio, or even full-motion video. In choosing among ISPs, firms setting up telecommuting programs seek to determine whether the ISP can support these applications. While the speed of the DSL connection offered by the ISP is a critical component, ISPs also compete based on the quality of their peering arrangements and their ability to control the flow of information through the Internet. For example, an ISP that peers with a "tier one" backbone provider is more likely to be able to provide end-users with rapid, reliable access to bandwidth-intensive applications than an ISP that peers with a tier two or tier three backbone provider.

- *Proprietary Applications.* Broadband ISPs also compete by offering users different proprietary applications. For example, some ISPs may allow users to access proprietary content, web hosting services, and premium e-mail features.

- *Premises Equipment.* Broadband Internet access typically requires the use of premises-based equipment, such as a DSL modem. As a result of competition, ISPs offer a number of equipment choices – not only about the types of equipment, but also about whether to purchase or lease the equipment from the ISPs. Some ISPs also seek to differentiate themselves by offering "managed" service, in which they monitor the operation of the premises-based equipment and provide necessary modifications or repairs.

- *Security/Privacy Protection.* Protection of information security and user privacy has become increasingly important to many users. In this area, as well, competition has resulted in broadband ISP customers having a wide range of options. For example, many ISPs offer services that accommodate a corporation's need to encrypt sensitive information that travels between an employee's home and the firm's internal network. Similarly, some ISPs provide

> support for "firewall appliances," which are premises-based devices that can deter "hackers" from using an employee's Internet connection in order to access a firm's corporate network. These devices also can prevent the spread of viruses, from the Internet, through the employee's PC, into the firm's internal network. A number of ISPs are also offering sophisticated applications to prevent IP address "spoofing" – a practice in which one user is able to "mimic" another user's Internet address, enabling the first user to send messages that appear to come from the second user.

If the Commission eliminates (or fails to enforce adequately) the *Computer II* unbundling requirement – and thereby allows the ILECs to drive non-affiliated broadband ISPs out of the market – consumers will clearly pay a high price. The current wide range of highly differentiated information services offerings would almost certainly be replaced by a small number of standardized "commodity" services. The resulting broadband Internet access service duopoly likely would be characterized by higher prices, fewer choices, lower service quality, and reduced innovation.

There is no sound policy justification for depriving consumers of the benefits of today's highly competitive broadband information services market. As discussed further below, the two most-often-advanced justifications for eliminating the *Computer II* unbundling requirement – that it is necessary to create incentives for further broadband deployment and that the Commission must create "regulatory symmetry" between ILEC and cable broadband information services – are without merit.

The Commission's Desire to Promote Broadband Deployment Does Not Justify Eliminating the *Computer II* Unbundling Rules

The desire to promote broadband deployment does not provide a basis for eliminating the ILECs' obligation to unbundle the telecommunications functionality that they use to provide broadband information services and make it available, as a telecommunications service, on just, reasonable, and non-discriminatory terms. There clearly is no "supply-side" broadband shortage. According to a recent study by the Office of Technology Policy:

- Bell South [sic] reported that it had increased its broadband coverage to 72% of the households it serves (*July 22, 2002).*
- SBC reported broadband availability to 26 million customer locations, roughly 64% of its wireline customer locations (*SBC DSL Update, Aug. 2002).*
- Verizon said it had "deployed DSL to central offices serving 79% of the company's access lines" as of the end of 2001 *(Verizon Investor Quarterly, Jan. 31, 2002).*

- Qwest has stated an intention to increase from 45% broadband availability at 2001 year-end to 70% by the end of 2002 *(Dec. 31, 2001)*.[11]

Rather, limited broadband deployment results from a lack of consumer demand. Indeed, while high-speed Internet service is *available* to approximately 86 million U.S. households, only about 13 million homes *subscribe* to any type of broadband service.[12] The main obstacles, according to the Office of Technology Policy report, are continued high price and lack of a "killer application."[13] Demand, however, appears to be increasing. A recent Commission study found that, during the second half of 2001, the ILECs deployed more than 1.3 million new DSL lines.[14] Indeed, the growth rate for ILEC-provided broadband services continues to *exceed* that of cable-provided broadband services.[15] There is, therefore, no justification for the Commission to dismantle existing regulatory provisions designed to promote competition in order to create "incentives" for ILEC broadband deployment. Rather, the Commission's principal goals should be to continue to foster competition, while taking actions that will spur consumer demand for broadband services.

In any case, there is no sound evidence that the *Computer II* unbundling rules have limited the ILECs' economic incentive to deploy broadband services. The "unbundling" issues raised in this proceeding are fundamentally different from the "unbundling" issue presented in the *UNE Triennial Review* docket. In the *UNE Triennial Review,* the Commission is seeking to determine whether the existing requirement that ILECs unbundle specified network elements, and make them available at TELRIC-based prices, has decreased the incentive of CLECs to deploy their own competitive facilities.[16] Whatever the merits of that concern may be, it has *no application* to the present proceeding. The Commission has never required ILECs to provide ISPs with transmission service at TELRIC rates. Rather, the Commission has merely required that ILECs make transmission service available at just,

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[11] *OTP Report* at 5.

[12] *See High-Speed Service for Internet Access* at Table 1. By contrast, more than 61 million households have narrowband (dial-up) Internet access. *See* Information Technology Association of America, *Positively Broadband: Building a Positive, Competitive Broadband Agenda,* at 8 (Oct. 2001) *available at* http://www.positivelybroadband.org.

[13] *OTP Report* at 14-15.

[14] *See High-Speed Service for Internet Access* at Table 1.

[15] *See id.* (ADSL lines in service increased by 47 percent; coaxial cable lines in service increased by only 36 percent).

[16] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd at 22792-94.

reasonable, and non-discriminatory prices – which can allow for full recovery of historic and other appropriate costs.

There also is no merit to the suggestion that the *Computer II* unbundling requirements deter more extensive broadband deployment because they do not allow the ILECs to design a range of flexible wholesale broadband offerings. The existing rule does not obligate the ILECs to offer broadband telecommunications service on a "one-size-fits-all" basis. Rather, it merely requires ILECs to provide ISPs with the *option* of purchasing transmission service on the same prices, terms, and conditions that the ILEC provides this service to its own information service operations. The ILECs remain free to design a wide range of broadband offerings that respond to the needs of specific customers or market segments – provided they make these offerings available to any similarly situated customer.

Finally, there plainly is no basis to conclude that the *Computer II* unbundling requirement eliminates the incentives of cable and other platform operators, which are not subject to the requirement, to deploy competitive broadband offerings. So long as the ILECs can provide unbundled broadband telecommunications services at prices that recover their marginal costs, there is no regulatory disincentive for other providers to enter the market.

Promoting "Regulatory Symmetry" Between ILEC and Cable Broadband Providers Does Not Justify Radical Deregulation

The desire for "regulatory symmetry" between ILEC-provided and cable-provided broadband services does not provide a basis for elimination of the *Computer II* unbundling rules. Congress has never directed the Commission to ensure "regulatory symmetry." To the contrary, the Communications Act establishes fundamentally *different* regulatory regimes for telecommunications carriers and cable system operators – which each impose unique benefits and burdens.[17] For example, while the ILECs must provide telecommunications service on just, reasonable, and non-discriminatory terms, they receive significant regulatory subsidies through the Commission's carrier access charge and universal service regimes. At the same time, while cable system operators have not been subjected to "open access" requirements, they have been required to pay significant franchise fees, while devoting a large portion of the capacity of their networks to the carriage of local broadcast signals and Public Service, Educational, and Government ("PEG") programming.

The fundamental obligation of a telecommunications common carrier is the duty to provide telecommunications service, on reasonable request, at just, reasonable, and non-discriminatory prices,

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[17] During the consideration of the Telecommunications Act, Vice President Gore proposed adoption of a new "Title VII" of the Communications Act that would have created a single "light touch" regulatory regime applicable to all broadband telecommunications services. Congress declined to do so.

terms, and conditions. The fact that cable system operators are not legally obligated to provide unbundled broadband transmission service on request – and because, in practice, they do not do so – does not provide a basis to eliminate the ILECs' common carrier obligations. To the contrary, it makes it *more* important to ensure that the ILECs continue to fulfill their obligations as common carriers by providing the broadband telecommunications services that ISPs require.

The Commission Should Not Consider Eliminating the *Computer II* Unbundling Requirements Until ISPs have Meaningful Choices Among Wholesale Broadband Telecommunications Providers

ITAA has long advocated the elimination of regulatory requirements that have proven unnecessary or ineffective. However, because ISPs currently remain almost entirely dependent on ILECs for the wholesale broadband telecommunications services that they require to provide competitive information service to their mass-market subscribers, any consideration of eliminating the *Computer II* unbundling requirement is clearly premature.[18] Rather than eliminating a requirement that still performs a critical function, the Commission should vigorously enforce the ILECs' unbundling obligation. At the same time, the Commission should continue to monitor the market for wholesale mass-market broadband telecommunication services. The Commission can revisit the question of

[18] Consideration of elimination of the *Computer II* unbundling requirement is premature for a second reason. As ITAA has previously explained, the Commission currently lacks legal authority to eliminate this requirement. The Commission has repeatedly recognized that, in addition to the *Computer II* rules, the non-discrimination requirement in Section 202 of the Communications Act, 47 U.S.C. § 202, requires facilities-based carriers to unbundle the telecommunications functionality that they use to provide information services. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001) ("[A]ll carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."); *Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion And Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service,* Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995). The Commission cannot forebear from enforcing this requirement: Section 10 of the Communications Act precludes the Commission from forbearing from imposing any statutory provision necessary to ensure that a carrier's practices are not "unreasonably discriminatory," 47 U.S.C. § 160(a). Nor can the Commission circumvent this restriction on its forbearance authority by "reclassifying" the ILECs' broadband telecommunications offerings as "private carriage," subject to the Commission's "Title I authority." *See* ITAA Comments, CC Docket 02-33, at 13-14 (filed May 3, 2002); *cf. ASCENT v. FCC,* 235 F.3d 662, 665-66 (D.C. Cir. 2001) (rejecting the Commission's attempted "circumvention" of the restrictions on its forbearance authority).

whether to lift the *Computer II* unbundling requirement when it determines that ISPs have meaningful choices among wholesale mass-market broadband telecommunications service providers.

The Commission's decisions over the coming months will shape the Internet market for years to come. In order to ensure that consumers continue to enjoy the significant benefits of today's competitive broadband information services market, ITAA urges the Commission to preserve the existing *Computer II* unbundling requirement until ISPs have meaningful choices among wholesale mass-market broadband telecommunications service providers.

Sincerely,

Jonathan Jacob Nadler
Counsel to ITAA

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Robert Pepper
William Maher
Carol Mattey
Michelle Carey
Brent Olson